No. 89-1670

In The

Supreme Court of the United States

October Term, 1989

GLORIA E. SOTO,

Petitioner,

v.

STATE OF NEW JERSEY, NEW JERSEY CASINO CONTROL COMMISSION AND DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT J. DEL TUFO
Attorney General of New Jersey

By: ANTHONY J. PARRILLO*
Assistant Attorney General

GARY A. EHRLICH
Deputy Attorney General

Richard J. Hughes
Justice Complex
25 Market Street
CN-047
Trenton, New Jersey 08625
(609) 292-9394

Attorneys for Respondent State of New Jersey, Department of Law and Public Safety, Division of Gaming Enforcement.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does a New Jersey statute which, as an anti-corruption measure, prohibits political contributions by a small class of high-ranking casino officials unconstitutionally abridge the First Amendment rights of such officials?

2. Is the New Jersey statute unconstitutionally overbroad in prohibiting contributions by casino officials to any political organization or candidate in the State?

3. Is the New Jersey statute, as judicially construed to prohibit contributions by casino officials of money or any "thing of value" constituting a monetary substitute, unconstitutionally vague?

4. Does the application of the New Jersey statute only to officials involved in the State's casino industry deny such officials equal protection under the Fourteenth Amendment?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of New Jersey, Department of Law and Public Safety, Division of Gaming Enforcement, respectfully requests that this Court deny the petition for a writ of *certiorari* to review the judgment of the Superior Court of New Jersey, Appellate Division, in this case.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. §1257(a) to review the judgment of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), because that court is not the highest court of New Jersey in which a decision on the merits could have been had by Petitioner. Although Petitioner unsuccessfully sought *discretionary* review of the judgment of the Appellate Division by the Supreme Court of New Jersey, Petitioner failed to perfect an *appeal as of right* to the state Supreme Court which was *prima facie* available to Petitioner under the New Jersey Court Rules. Petitioner's failure to pursue all means of obtaining review by the highest appellate court in New Jersey deprives this Court of jurisdiction to review the judgment of the intermediate appellate court.

STATEMENT OF THE CASE

In 1976, the people of New Jersey amended their state Constitution to permit the legislative authorization of casino gambling within the municipality of Atlantic City. The New Jersey Legislature conducted extensive hearings and, in cooperation with the Governor, commissioned numerous studies on how best to prevent the crime and corruption which had elsewhere been associated with the casino industry. On the basis of these hearings and empirical studies, New Jersey adopted the Casino Control Act, N.J. Stat. Ann. §5:12-1 *et seq.*, a comprehensive statutory scheme that authorized casino gambling subject to a rigorous system of regulation for the

entire casino industry. *Brown v. Hotel and Restaurant Employees & Bartenders*, 468 U.S. 491, 494-495 (1984).

With regard to political contributions by casino industry licensees, the Legislature was made aware of the possibility that such contributions could lead to the fact or appearance of governmental corruption via the Report and Recommendations on Casino Gambling by the State Commission of Investigation 4I-5I (1977), which stated:

> [C]ontributions by casino licensees, both corporate and individual, give the *appearance* of attempting to "buy" political influence and favoritism and in fact have the very real potential for causing such favoritism to occur. The referendum on casino gambling itself gave rise also to this very appearance. The campaign committee formed to raise money to back casino gambling received large contributions from hotels and other persons and corporations obviously in a position directly to benefit by passage of this legislation. In at least two instances, these contributions exceeded $50,000; in several others they exceeded $5,000.
>
> This money in turn was distributed in part to the previously mentioned local public officials and employees as salaries and street money for the election campaign. The campaign committee also spent part of its funds to hold receptions at both national presidential nominating conventions. During these receptions, the committee lobbied with political figures, both office holders and non office-holders, on behalf of casino gambling.
>
> The State Commission of Investigation is inclined to recommend, an absolute prohibition against any licensee of the state regulatory authority, whether it be an individual, corporation or so-called "holding company" from making a

> contribution to any political candidate, party or campaign organization within this State, either directly or indirectly.

Responding to this warning and recommendation, the Legislature enacted N.J. Stat. Ann. §5:12-138, which prohibits casinos, casino-related companies, and high-ranking casino officials from contributing any money or thing of value to any state political candidate or party. Violation of this provision is punishable as a misdemeanor. N.J. Stat. Ann. §5:12-120.

Petitioner became subject to N.J. Stat. Ann. §5:12-138 by virtue of her position as associate general counsel of a casino hotel, which required her to be licensed as a casino key employee (Pet. 4a). Although Petitioner was not permitted by the Casino Control Commission to contribute money or professional services to certain state political parties or committees, she was permitted to be a member of such organizations and to provide such personal services as were necessary to facilitate the expression of her views (Pet. 6a-7a).

In response to Petitioner's factual presentation, three key points should be emphasized. First, N.J. Stat. Ann. §5:12-138 does not have statewide or even casino industry-wide applicability; the statute affects only the highest ranking 3.5% of the individuals employed by the casinos (Pet. 23a n.4, 37a). Second, N.J. Stat. Ann. §5:12-138 prohibits only the "undifferentiated, symbolic act of contributing," at most "only a marginal restriction upon [Petitioner's] ability to engage in free communication." *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam). Finally, Petitioner, like all other casino officials, remains

free under N.J. Stat. Ann. §5:12-138 to express her political opinions to anyone who will listen, to announce her support for political candidates or parties, to vote, to join political parties or groups, and to volunteer non-professional services to such parties or groups (Pet. 37a).

The full procedural history of this matter is set forth in the decision of the court below (Pet. 3a-9a).

REASONS FOR DENYING THE WRIT

1. Petitioner's failure to perfect an appeal to the Supreme Court of New Jersey from the judgment of the Appellate Division deprives this Court of jurisdiction to review the judgment of the Appellate Division.

Under 28 U.S.C. §1257(a), this Court's *certiorari* jurisdiction is restricted to "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had . . . " For sound jurisprudential reasons, this Court has held that *certiorari* will not lie to review a judgment of an intermediate appellate court where the petitioner has failed to seek consideration of such judgment by the State's highest court either by appeal as of right, *Southern Electric Co. v. Stoddard*, 269 U.S. 186, 188-190 (1925), or by petition for discretionary review, *Banks v. California*, 395 U.S. 708, 708 (1969) (per curiam). See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure §4007 at 554 (1977); 12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice ¶509.01 at 8-53 to 8-54 (2d ed. 1989); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice §§3.16, 3.17 (6th ed. 1986); Annotation, 61 L.Ed. 2d 944, 955-956, 957-959 (1980). Where more

than one method exists for obtaining review by the State's highest court, the petitioner must invoke all such methods or suffer dismissal of his *certiorari* petition. *Gotthilf v. Sills*, 375 U.S. 79, 79-80 (1963) (per curiam); C. Wright *et al., supra*, §4007 at 554.

Under the New Jersey Court Rules, a litigant may seek review of a judgment of the Appellate Division by filing a petition for certification, which the Supreme Court of New Jersey may grant or deny in its discretion. N.J.R. App. P. 2:2-1(b), 2:12-4, 2:12-9. The Rules also provide for an appeal as of right to the Supreme Court "in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States . . . " N.J.R. App. P. 2:2-1(a)(l). This procedure is different from and independent of certification, and requires the Supreme Court either to accept the appeal, if it deems the constitutional question substantial, or dismiss the appeal, if it does not. N.J.R. App. P. 2:12-9; *Deerfield Estates, Inc. v. Township of East Brunswick*, 60 N.J. 115, 188-121, 286 A. 2d 498, 500-501 (1972).

In this case, Petitioner requested certification of the judgment of the Appellate Division to the Supreme Court of New Jersey, which was denied (Pet. la). However, Petitioner failed to perfect an appeal as of right to the Supreme Court which was *prima facie* available to her pursuant to N.J.R. App. P. 2:2-1(a). This Court has previously declined to engage in conjecture as to what a state supreme court would do if properly requested to review a case. *Stratton v. Stratton*, 239 U.S. 55, 56-57 (1915); C. Wright *et al., supra*, §4007 at 554. But even assuming *arguendo* that the Supreme Court of New Jersey would have summarily dismissed Petitioner's appeal, such a

dismissal would still have constituted a decision on the merits. *Deerfield Estates, supra,* 60 N.J. at 118-121, 286 A. 2d at 500-501. In that event, *certiorari* would have lain to review the judgment of the New Jersey Supreme Court, not that of the Appellate Division. *R.J. Reynolds Tobacco Co. v. Durham Cty.,* 479 U.S. 130, 138-139 (1986); *Posadas de Puerto Rico Assoc. v. Tourism Co.,* 478 U.S. 328, 338 (1986).

Because Petitioner failed to utilize an available avenue of appeal to the Supreme Court of New Jersey, the Appellate Division is not the highest court of New Jersey in which a decision on the merits could be had. This Court, therefore, lacks jurisdiction to review the judgment of the Appellate Division under 28 U.S.C. §1257(a).

2. In upholding a prohibition on political contributions by officials in the strictly regulated casino industry, the Appellate Division correctly applied the First Amendment decisions of this Court.

In *Buckley v. Valeo, supra,* this Court recognized that, in contrast to political *expenditures,* political *contributions* involve only an attenuated form of protected First Amendment activity:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase

> perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. [424 U.S. at 20-21 (footnote omitted)].

To the same effect is *California Medical Ass'n v. FEC*, 453 U.S. 182, 196 n. 16 (1981), which, in referring to political contributions, observed that "this attenuated form of speech does not resemble the direct political advocacy to which this Court in *Buckley* accorded substantial constitutional protection." The lesser constitutional shelter afforded political contributions has played a significant role in the decisions of this Court approving restrictions on such contributions. *See, e.g., FEC v. Nat'l Right To Work Committee (NRWC)*, 459 U.S. 197, 207-211 (1982); *California Medical Ass'n v. FEC, supra*, 453 U.S. at 193-199; *Buckley v. Valeo, supra*, 424 U.S. at 20-29.

Contrary to Petitioner's suggestions (Pet. 8, 13), this Court has never established any constitutional "bright line" between a *prohibition* and a *limitation* on contributions, see *Austin v. Michigan Chamber of Commerce*, 494

U.S. ___, 110 S. Ct. 1391, 1396-1401 (1990) (upholding state statute prohibiting corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in election for state office), or between the First Amendment rights of *corporations* and *individuals*, see *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-786 (1978) (holding that even corporations possess First Amendment rights). Indeed, in *Republican Nat'l Committee v. FEC*, 445 U.S. 955 (1980) (mem.), *aff'g* 487 F.Supp. 280 (S.D.N.Y. 1980), this Court summarily affirmed a decision upholding a campaign finance law prohibiting the receipt of private contributions by a candidate accepting public funds; the District Court had rejected the contention that the law violated the First Amendment rights of those desiring to make contributions to the candidate. 487 F.Supp. at 286-287.

The analysis employed by this Court in any case presenting a First Amendment challenge to a state law does not turn on labels, but rather involves a delicate three-part inquiry: (1) Does the law burden the exercise of political speech? (2) Does the law serve a compelling state interest? (3) Is the law narrowly tailored to achieve its goal? *See, e.g., Austin v. Michigan Chamber of Commerce. supra,* 110 S.Ct. at 1396. In this case, it is clear that the prohibition on political contributions burdens only a symbolic form of speech which does not constitute direct political advocacy. *Buckley v. Valeo, supra,* 424 U.S. at 21. It is also obvious that N.J. Stat. Ann. §5:12-138 serves an anti-corruption interest which has previously been recognized as compelling. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985).

Petitioner's only real argument, that a *limitation* on contributions would be sufficient to achieve the State's goals (Pet. 9-11), appears more factual than constitutional. The definitive response to this argument was provided by the Supreme Court of Illinois, in upholding a prohibition on political contributions by a licensee in the closely regulated liquor industry:

> We agree that it is large campaign contributions which are most likely to create a danger that liquor licensees or other individuals in the liquor business may obtain a degree of influence over public officials. The General Assembly may reasonably have believed, however, that its efforts to further the relevant State interests would have been much less effective if only contributions above a certain amount were prohibited. It is possible that a liquor licensee could circumvent a law proscribing only large contributions by financing a large number of small contributions ostensibly given by his friends and associates. Also, if many liquor licensees acted in concert and each made a small contribution to a particular candidate, it is conceivable that they could, as a group, accomplish what section 12a of the Liquor Control Act was intended to prevent. [*Schiller Park Colonial Inn., Inc. v. Berz*, 63 Ill. 2d 499, 349 N.E. 2d 61, 66 (1976)].

So too here, the New Jersey Legislature could reasonably have believed that its efforts to prevent the fact or appearance of corruption would be much less effective if casino executives could achieve by indirection what a casino could not achieve directly. And as this Court stated in *FEC v. NRWC, supra*: "[W]e [will not] second-guess a legislative determination as to the need for prophylactic

measures where corruption is the evil feared." 459 U.S. at 210.

The same principle governs Petitioner's argument that N.J. Stat. Ann. §5:12-138 is overbroad because it bans contributions by casino officials to all state candidates and political parties (Pet. 11n.3). Again, the definitive response was provided by the *Schiller Park* court in the analogous field of liquor regulation:

> It is difficult and probably impossible to determine precisely which officeholders will be in a position to exercise influence in the area of liquor regulation. The nature of our political system and past history suggests that political officials or public officers may wield powers or possess influence beyond the powers and influence inherent in their official duties. In attempting to prevent liquor licensees from obtaining influence in the area of liquor regulation, therefore, the legislature acted reasonably in proscribing the giving of campaign contributions by liquor licensees to any candidate. [349 N.E. 2d at 67].

In sum, the judgment of the Appellate Division represents nothing but a straightforward and correct application of *Buckley* and other relevant First Amendment decisions of this Court.

3. Petitioner's argument that N.J. Stat. Ann. §5:12-138 is vague in prohibiting the contribution of any "thing of value" is insubstantial and does not merit this Court's review.

N.J. Stat. Ann. §5:12-138 prohibits casino officials from directly or indirectly paying or contributing any money or "thing of value" to any political candidate or

party. As construed by the Appellate Division,* "thing of value" includes professional services – such as legal services – which would have a monetary value to the candidate or party unrelated to the political or ideological beliefs of the contributing attorney or other professional (Pet. 24a-26a). Since professional services are essentially a substitute for, and thus the equivalent of, money, a prohibition on the contribution of such services does not violate the First Amendment for the reasons stated in Point 2 above. And as interpreted by the court below, the statute sets out the prohibition in terms that a casino executive exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. See *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

Petitioner's vagueness argument is no more substantial when recast in terms of a First Amendment "chill." (Pet. 12). The only activity which might possibly be discouraged by the existing construction of N.J. Stat. Ann. §5:12-138 is a casino official's donation to a political candidate or party of non-professional services which that official believes, erroneously, to constitute professional services. But any casino official in doubt as to what is permissible under the law may, as Petitioner did in this case (Pet. 3a-7a), seek and obtain from the Casino Control

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*Although the Petition makes some reference to matter contained in a brief filed by the Casino Control Commission below (Pet. 12), it is clear that, in evaluating the constitutionality of N.J. Stat. Ann. § 5:12-138, this Court will consider only the construction of the statute adopted by the state courts. See *Posadas de Puerto Rico Assoc. v. Tourism Co., supra*, 478 U.S. at 339.

Commission a declaratory ruling with respect to the applicability of the statute to "any person, property or state of facts." N.J. Admin. Code tit. 19, §42-9.1. The availability of this procedure reduces any First Amendment "chill" to the vanishing point, *Martin Tractor Co. v. FEC*, 627 F. 2d 375, 384-386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980), and cures any residual vagueness in the law, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

4. Petitioner's contention that N.J. Stat. Ann. §5:12-138 unconstitutionally discriminates against officials in the casino industry is also insubstantial and does not merit this Court's review.

In *Austin v. Michigan Chamber of Commerce, supra*, this Court demonstrated again that a state statute affecting First Amendment rights does not violate the Equal Protection Clause of the Fourteenth Amendment by distinguishing between different types of business corporations, so long as the distinction serves a compelling state interest. 110 S.Ct. at 1401-1402. This case involves only a routine application of this principle.

Under New Jersey law, the casino gaming industry is regarded as uniquely susceptible to crime and corruption. *Greenberg v. Kimmelman*, 99 N.J. 552, 560, 494 A.2d 294, 298-299 (1985); *Knight v. Margate*, 86 N.J. 374, 380-381, 431 A.2d 833, 842 (1981). Moreover, with the imprimatur of the State, casinos and their officials have accumulated enormous and concentrated economic power. *Greenberg v. Kimmelman, supra*, 99 N.J. at 561, 494 A. 2d at 299; *Matter of Casino Licensee*, 224 N.J. Super. 316, 322, 540 A. 2d 523,

526 (App. Div. 1988). Under these circumstances, our Legislature could reasonably have concluded that only the casino industry presented a danger of governmental corruption sufficiently compelling to warrant the prohibition embodied in N.J. Stat. Ann. §5:12-138.* See *Austin v. Michigan Chamber of Commerce, supra,* 110 S.Ct. at 1401-1402.

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*In this connection, the Court may note that some of the allegations arising out of the "Abscam" prosecutions in the early 1980's related to casino activities and interests. See *United States v. Williams,* 705 F. 2d 603, 623 (2d Cir.), *cert. denied,* 464 U.S. 1007 (1983); *United States v. Myers,* 692 F. 2d 823, 829-830 (2d Cir. 1982), *cert. denied,* 461 U.S. 961 (1983); *MacDonald v. Time, Inc.,* 554 F. Supp. 1053, 1053-1054 (D.N.J. 1983); *Knight v. Margate, supra,* 86 N.J. at 382n.3, 431 A.2d at 837n.3.

CONCLUSION

For the reasons set forth herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

ROBERT J. DEL TUFO
Attorney General of New Jersey

By: ANTHONY J. PARRILLO*
Assistant Attorney General

GARY A. EHRLICH
Deputy Attorney General

Richard J. Hughes
Justice Complex
25 Market Street
CN-047
Trenton, New Jersey 08625
(609) 292-9394

Attorneys for Respondent State of New Jersey, Department of Law and Public Safety, Division of Gaming Enforcement.

*Counsel of Record

APPENDIX

N.J.R.App. P. 2:2-1. "Appeals to the Supreme Court from Final Judgments"

> (a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States . . .
>
> (b) On Certification. Appeals may be taken to the Supreme Court from final judgments on certification to the Appellate Division pursuant to R. 2:12.

N.J.R.App. P. 2:12-4. "Grounds for Certification"

> Certification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

N.J.R.App. P. 2:12-9. "Where Party Appeals and at the Same Time Makes Application for Certification"

> Where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, he shall state in the petition for certification all questions he intends to raise on the appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court

shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders.

N.J. Admin. Code tit. 19, § 42-9.1. "Declaratory rulings"

(a) Pursuant to N.J.S.A. 52:14B-8, any interested person may request that the Commission render a declaratory ruling with respect to the applicability to any person, property or state of facts of any provision of the act or of any regulation of the Commission.

(b) A request for a declaratory ruling shall be initiated by a petition. The petition shall include the following items with specificity:

1. The nature of the request and the reasons therefor;

2. The facts and circumstances underlying the request;

3. Legal authority and argument in support of the request;

4. The remedy or result desired.

(c) If the Commission, in its discretion, decides to render a declaratory ruling, a hearing shall be afforded prior to the rendering of such a ruling.

1. Where there exists disputed issues of fact which must be resolved in order to determine the rights, duties, obligations, privileges, benefits or other legal relations of specific parties, such hearings shall be conducted in accordance with N.J.A.C. 19:42-2.

2. Where there exists no such disputed issues of fact as identified in (c)1 above, the matter shall proceed on the petition, any other papers requested of the parties, and oral argument, if permitted by the Commission.

(d) In appropriate cases, the Commission may notify persons who may be interested in or affected by the subject of the declaratory ruling. In such cases, the Commission may afford these persons an opportunity to intervene as parties or to otherwise present their views in an appropriate manner which is consistent with the rights of the parties.